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**Minnesota Timberwolves Basketball, LP and International Alliance of Theatrical Stage Employees, Petitioner.** Case 18–RC–169231

August 18, 2017

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE  
AND MCFERRAN

The issue in this case is whether individuals in the unit (crewmembers) who produce electronic content that is displayed on a four-sided video display apparatus (center-hung board or board) during professional basketball games are employees covered under Section 2(3) of the National Labor Relations Act or independent contractors.<sup>1</sup>

The Employer, Minnesota Timberwolves Basketball, LP, owns and operates two professional basketball teams—the Minnesota Timberwolves of the NBA and the Minnesota Lynx of the WNBA—both of which play home games at Target Arena in Minneapolis, Minnesota. On game days, the center-hung board, which is suspended above the basketball court, displays live basketball game footage, replay footage, real-time game statistics, advertisements, other graphics and fonts, and some pre-produced video material. Crewmembers produce the content that is displayed on the center-hung board. Petitioner International Alliance of Theatrical Stage Employees filed a petition to represent the crewmembers on February 8, 2016, contending that they are employees within the meaning of the Act. The Employer contends that crewmembers are independent contractors excluded from the Act’s coverage.

On March 3, 2016, the Regional Director for Region 18 issued a Decision and Order in which he found that the petitioned-for crewmembers are independent contrac-

tors and not statutory employees. Accordingly, he dismissed the petition. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board’s Rules and Regulations, the Petitioner filed a timely request for review. The Employer filed an opposition.

On July 19, 2016, the Board granted the Petitioner’s request for review.<sup>2</sup> The Petitioner and the Employer each filed a brief on review.

The Board has carefully considered the entire record in this proceeding, including the briefs on review. For the reasons set forth below, we find, contrary to the Regional Director, that the crewmembers are statutory employees. Accordingly, we reinstate the petition and remand this case to the Regional Director for further appropriate action.

**I. FACTS**

The Employer’s basketball teams play a combined total of approximately 60 home games per season at Target Arena.<sup>3</sup> For each game, the Employer fills the following 16 crewmember positions: three utilities; three camera operators; three replay operators; one engineer in charge; one engineer; one font operator; one Thunder<sup>4</sup> operator; one audio/tape operator; one technical director; and one director. For purposes of filling these positions, the Employer maintains a roster, currently listing 51 individuals, which includes notations signifying which positions each individual is qualified to fill. Many crewmembers are qualified to work in several of the video-production classifications within the crew, and the roster reflects this.<sup>5</sup> If an individual tells the Employer that he no longer wants to be considered for positions within the crew, the Employer will remove his name from the roster. In one instance, the Employer received complaints from members of the crew alleging that a certain individual was

<sup>2</sup> The three-member panel of the Board that granted review consisted of then-Chairman Pearce, Member McFerran, and then-Member Hirozawa.

<sup>3</sup> Target Arena is owned by the City of Minneapolis. Under the Employer’s lease agreement with the city, however, the Employer operates the arena and all of the technical equipment and appliances it contains—including the center-hung board and multiple other televisions showing the game, advertisements, and other visual content—along with other equipment and instrumentalities it owns or leases itself.

<sup>4</sup> Thunder is a brand of computer. The Employer loads pre-produced content onto the Thunder computer such as graphics (e.g., stills and animations) and the crewmember working in the Thunder operator classification may in turn cause that content to be displayed on the center-hung board.

<sup>5</sup> For example, the roster shows that crewmember JoAnn Babic is qualified to work as director and technical director; crewmember Jackie Gambaiani is qualified to work as technical director, font operator, Thunder operator, or utility; and crewmember Jason Wiltse is listed as qualified to work as camera operator, although Wiltse testified that he is also qualified to work as a utility or audio operator.

<sup>1</sup> The parties stipulated to the following appropriate unit if an election were directed:

All regular part-time freelance technicians, including Directors, Technical Directors, Audio/Tape Operators, Engineers in Charge, Engineers, Camera Operators (including stationary, mobile and remotely operated), Font Operators, Thunder Operators, Replay Operators, Utilities and others in similar technical positions performing pre-production, production and post-production work in connection with closed circuit telecasts displayed on the in-house video system within the Employer’s home arena, including such telecasts of Minnesota Timberwolves games, Minnesota Lynx games, pre-game shows and post-game shows; excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

“not professional enough” and “can’t work here anymore.” The Employer responded by removing that individual’s name from the roster.

Before the start of the basketball season, the Employer’s Senior Broadcast Production Manager (SBPM), Erik Nelson, sends a schedule of games to crewmembers and asks them to specify their availability for the season’s upcoming games. The Employer does not require that crewmembers be available for a minimum number of games, nor does it limit the number of games crewmembers may work per season. Occasionally, the number of crewmembers available to work a particular game exceeds the Employer’s need. In those instances, the SBPM determines who will work based on his order of preference. The SBPM also determines which classification an available crewmember is assigned, given that many are qualified to work in multiple classifications.

Once a crewmember commits to work a particular game, he does not need advance approval from the Employer if he later decides not to work that game. But he is required to find his own replacement. Beginning with the 2015–2016 Timberwolves season, the Employer implemented a new requirement that if a crewmember is unable to work a game for which he was initially available, he or she must find a suitable replacement from the roster and notify the SBPM of the change. Provided that they obtain replacements, there is no evidence that negative repercussions—such as removal from the roster or relegation to a lower-paid classification—befall crewmembers who change their availability after committing to work.

Regarding work hours, the NBA and WNBA set the tipoff times for games, but the Employer sets the call times for crewmembers to report to Target Arena and begin preparing for the game. Call times vary by classification. For example, pursuant to the Employer’s instructions, cameras 2 and 3 report 1.25 hours prior to the tipoff time, utilities report 1.5 hours prior to the tipoff, and camera 4 reports 3 hours prior to the tipoff.

The Employer provides virtually all of the equipment crewmembers use to produce content on the center-hung board, such as cameras, cables, headsets, instant replay machines, sound equipment, and equipment used to display fonts and graphics on the board. The sole exception is that Engineer-in-Charge Sean Nottingham brings a bag of his own tools for his own use, and sometimes other crewmember use Nottingham’s tools. The content of Nottingham’s tool bag varies, but it will generally include minor hand tools such as screw drivers and wrenches and some engineering-related tools like those used to terminate cables.

According to SBPM Nelson’s uncontradicted testimony, the Employer’s director of live programming (DLPE), currently Chad Folkestad, is the person in charge of all the various programming and events that occur at Target Arena during basketball games. For each game, the DLPE creates a “rundown,” essentially a script listing key events that will take place and be electronically recorded during the game.<sup>6</sup> SBPM Nelson explained that the crew’s director works closely with the DLPE to ensure that the production on the center-hung board is of a quality and content that satisfy the Employer’s standards.<sup>7</sup> More specifically, on the day of a game, the director arrives at Target Arena before the rest of the crew and meets with the DLPE.<sup>8</sup> During these pregame meetings, the DLPE and the director discuss what the crewmembers will do during the game, including during “non-game times.”<sup>9</sup> The DLPE will sometimes conduct a rehearsal before the game starts with certain crewmembers, in which they review the rundown and events that will occur during nongame times. For example, during rehearsal the DLPE may tell camera operators where Crunch, the Timberwolves’ mascot, is expected to be at certain times and what types of camera shots should be used so that the audience will be able to see Crunch clearly. The crew’s adherence to the DLPE’s rundown is not absolute because, as noted below, live calls by the director or the DLPE during a game take precedence over the rundown.

At some point shortly before tipoff, the director, along with some crewmembers, reports to the control room, which is below ground level and out of sight from the audience. (Other crewmembers engaged in camera work circulate around the court.) During the game, the director, in consultation with the DLPE, decides what footage and graphics to display on the center-hung board. One crewmember testified that the director tells others in the control room to “take this camera, go to a replay, add a graphic, lose a graphic,” and gives other similar instructions. While the director independently makes some decisions pertaining to various aspects of the video dis-

<sup>6</sup> There are no rundown scripts in evidence. It is not clear from the record exactly which crewmembers, other than the director, receive a copy of the rundown, but at least some camera operators receive it.

<sup>7</sup> The Employer notes in its brief on review that the director and DLPE work together to ensure that the programming is up to the standards of the NBA and WNBA, as well as the Employer.

<sup>8</sup> The Employer’s preferred director is Kari Ahlstrand. As noted, the director is one of the crewmember classifications that the parties agreed to include in the petitioned-for unit.

<sup>9</sup> “Non-game times” refers to periods when the basketball players are not on the court engaged in game play (i.e., time prior to the tipoff, time-outs during the game, quarter breaks, halftime, and time after the final buzzer).

play on the center hung-board, she also wears a headset enabling her to communicate with the DLPE, who is in Target Arena viewing what is happening in real time. The DLPE may tell the director to display a particular graphic or sponsor and he may specify Crunch's movements around the court.<sup>10</sup> The DLPE may also tell the director where in the Arena a particular couple is sitting so that the crew may capture that couple on camera for the "kiss cam."

As for the compensation paid to members of the crew, historically, the Employer paid them an hourly rate. But beginning with the 2015–2016 season, the Employer began paying crewmembers a "per game" rate, which varies according to the position.<sup>11</sup> For games that have special circumstances requiring an earlier call time or for those that run longer than usual, the Employer will pay a "mutually agreeable special rate." Simultaneous with the Employer's announcement of the per-game-rate compensation method, it also began requiring that crewmembers submit to the SBPM a monthly invoice of the games they have worked. The SBPM in turn sends the invoices to the DLPE, who codes, signs, and sends them to the Employer's accounts payable department. After the Employer announced this new payment system, one crewmember was able to negotiate a higher per-game rate to match what she earned under the previous hourly-pay system. No other crewmembers negotiated higher rates. The Employer does not withhold money for taxes or social security from the crewmembers' paychecks or provide fringe benefits. Crewmembers complete W-9 and 1099 forms.

Once an individual has worked on the crew during one basketball season, the Employer will contact them the following season for their availability to work games unless they ask not to be considered for future work. At least half of the individuals in the petitioned-for unit have performed work for the Employer in connection with the center-hung board since October 2012. Some crewmembers have had significantly longer tenures—for instance, Gambaiani has worked for the Employer for over 18 years; Wiltse has done so for at least 7 years; and Babic has done so for over 8 years.

As of the February 18, 2016 hearing in this matter, the Employer had 203 total employees on its payroll, and approximately 10 of them work in its "in-house video department" (separate from the unit at issue) which is

managed by the SBPM.<sup>12</sup> The in-house video department is responsible for creating pre-produced content that may be displayed on the center-hung board or on other monitors within Target Arena, including those near the concession stands. The in-house video employees also create various corporate videos that the Employer uses at locations other than the arena, along with content that the Employer displays online on various public websites. Some of the content that the crewmembers display on the center-hung board, in addition to the live-broadcast material, is content that was created by the Employer's in-house video department.

## II. ANALYSIS UNDER FEDEX

The National Labor Relations Act (the Act) guarantees employees the right to join a union. Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The party seeking to exclude individuals performing services for another from the protection of the Act on the grounds that they are independent contractors has the burden of proving that status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). In *FedEx Home Delivery*, 361 NLRB No. 55 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), en banc review denied per curiam June 23, 2017,<sup>13</sup> the Board restated and refined its approach to determining whether individuals are employees or independent contractors. Specifically, the Board reaffirmed its reliance on common-law agency principles, as guided by the nonexhaustive list of factors enumerated in the *Restatement (Second) of Agency* § 220 (1958).<sup>14</sup> In evaluating independent contractor status, all of the incidents

<sup>12</sup> More specifically, the in-house video department comprises six full-time salaried employees, one full-time hourly employee, and some part-time "game night associates."

<sup>13</sup> We adhere to the independent-contractor analysis adopted by the Board in *FedEx*, above, notwithstanding the District of Columbia Circuit's decision in that case. The court denied enforcement of the Board's order based on the "law-of-the-circuit doctrine" and the court's decision in a prior case that was factually indistinguishable. 849 F.3d at 1127. Even assuming that the court's decision can be read as a continued rejection of the Board's approach on the merits, the Board is not required to acquiesce in the adverse decision of a court of appeals. *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066–1067 (7th Cir. 1988).

<sup>14</sup> Those factors are: (1) the extent of control over the details, means and manner of the work; (2) whether the putative contractor is engaged in a distinct occupation or business; (3) whether the work is done under the direction of the principal, or by a specialist without supervision; (4) the skill required in the particular occupation; (5) who supplies the tools and place of work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether parties believe they are creating an employment or contract relationship; and (10) whether the principal is in business.

<sup>10</sup> The DLPE communicates with Crunch (as well as other entertainers, such as dancers) during games and accordingly knows in advance where Crunch will be and from which direction he will be coming.

<sup>11</sup> The Employer continues to pay the engineer in charge by the hour. Further, although the Employer pays the engineer 2 a per-game rate of \$230, it also pays that position an hourly rate for certain pregame work.

of the relationship must be assessed and weighed, with no one factor being decisive. *FedEx*, above, slip op. at 1 (citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968); *Roadway Package System, Inc.*, 326 NLRB 842 (1998)). In addition, the Board considers the extent to which a putative independent contractor is, in fact, rendering services as part of an independent business with an actual (not merely theoretical) entrepreneurial opportunity for gain or loss. *Id.*

Applying this test, the Regional Director found that the crewmembers are independent contractors rather than employees. He concluded that although some factors (length of employment and who supplies the tools and place of work) favor employee status and others (method of payment, the parties' belief as to whether they are creating an independent contractor relationship, and whether the services are rendered as part of an independent business) are inconclusive, the remaining factors favor independent contractor status and outweigh those favoring employee status or that are inconclusive. The Regional Director accordingly dismissed the petition.

Although the Regional Director properly articulated the relevant legal framework, we find that, under the *FedEx* formulation, the evidence fails to establish that the crewmembers are independent contractors rather than employees.<sup>15</sup> As explained below, the Employer maintains multiyear relationships with its crewmembers, enlists their services to accomplish a core part of its business as a professional athletics company, dictates when and where they work, provides all the key instrumentalities of the crewmembers' work, and exerts much more significant control than the Regional Director acknowledged over their work and the circumstances under which it is performed. These considerations, combined with a showing that crewmembers enjoy neither a proprietary interest in their work nor a voice in any important business decisions, outweigh the evidence that favors independent contractor status and serve as the foundation for our conclusion that the crewmembers are indeed statutory employees.

### 1. Extent of control by employer

The Regional Director found that the Employer exerts very little control over the essential details of the crewmembers' work, that there is "scant evidence" that the crew takes direction from the Employer, and that there are "only a few sporadic examples of Employer control" and "no evidence that crewmembers take anything ap-

proaching regular direction from the Employer's supervisors and managers." The Petitioner argues that these findings are erroneous and that the Regional Director ignored significant evidence of the Employer's control over the crew. We agree with the Petitioner.

Initially, contrary to the Regional Director, it is clear from the record that the director receives significant input from the DLPE for each and every game, both in meeting with the DLPE before the game to review the DLPE's rundown and in implementing the DLPE's rundown and live calls while the game is in progress.<sup>16</sup> The DLPE is present at all games<sup>17</sup> to provide the crewmembers with an array of game-day instructions for producing and displaying content on the center-hung board. The DLPE's instructions are unique to each game depending on what mascot skits or special programming the Employer has planned, what sponsorships the Employer wants to display, or what other specific items the Employer decides the crew needs to produce and display on the board during any given game. During pregame rehearsals, camera operators may receive specific instructions from the DLPE on what footage to capture and how to capture it.<sup>18</sup> For example, the DLPE may direct camera operators to use a specific camera angle to record

<sup>16</sup> The Employer's characterization of the DLPE's rundown, echoed by our dissenting colleague, as covering only "minor elements of the overall show" is not justified by the record. The Employer also contends that the rundown is not evidence of control based on *DIC Animation City*, 295 NLRB 989 (1989), which involved the status of script writers for an animated TV series. There, the Board found the control factor favored independent contractor status even though the employer provided the writers with script outlines and a "developmental bible" containing information about what was to happen within the series. However, the writers in *DIC Animation* worked under much different conditions than the crewmembers here, as the Board explained in that case:

The writer creates the story idea, the premise, the outline, and the script . . . [and] determines when to work, and owns the equipment used. . . [and] also determines whether to write stories as part of a team, and if the work is done on a team basis, which part each member writes, and how much each member is paid.

*Id.* at 991. Thus, although the "developmental bible" in *DIC Animation* was some evidence of employer control, it was not enough to demonstrate that the control factor favored employee status.

Here, by contrast, the crewmembers do not exercise the same sort of significant control over the substance, manner, and means of their work as did the writers in *DIC Animation*. Indeed, crewmembers are producing content directly correlated to a live basketball game, not writing an original story. Their ability to exercise some creative discretion, while present given the nature of the crew's work, is limited because they must abide by all live calls and must follow the Employer-created rundown.

<sup>17</sup> If DLPE Folkstad is not present for a game, another of the Employer's employees substitutes for him.

<sup>18</sup> It is therefore clear that the Employer controls not only the "ultimate ends to be achieved," as our dissenting colleague would have it, but also the "details of the work" the crewmembers perform.

<sup>15</sup> In addition, our assessment of the crewmembers' relationship to the Employer under the 10 common-law factors would similarly support our view that the crewmembers are employees, not independent contractors. See *Roadway Package System*, above, at 850.

a skit involving Crunch. Once the game starts, the crew follows the DLPE's rundown and any live calls received from him. The record, however, does not reveal what percentage of orders or live calls to the crew come from the director alone as compared to the director as a conduit for the DLPE.<sup>19</sup> Thus, to the extent that the Regional Director found that the DLPE's involvement in the details of the crew's work is merely "scant" or "sporadic," the record as a whole establishes otherwise.

Further, it is clear that the Employer has the right to issue additional game-day assignments to certain classifications and exercises this right. Specifically, in August 2015, SBPM Nelson sent an email to the individuals who work as replay operators stating that he "[h]ad a request for a clip from the last game to send to the league of a questionable call," so "[g]oing forward, please plan on putting a melt [a compilation of footage] together to run off at the end of the night with any questionable calls." Thus, the director and the rest of the crewmembers are subordinate to the Employer's SBPM and DLPE, and to a large extent they are bound by the DLPE's written script and impromptu directives and required to perform any additional tasks that the SBPM assigns.

In addition to the evidence of control imposed on the crewmembers while the basketball game is in progress, the Employer exercises control over the manner and means of their work in several other respects, which, as the Petitioner points out, the Regional Director did not consider in his analysis. To begin, on each occasion when a crewmember qualified to work in multiple classifications indicates he or she is available for a particular game, the Employer unilaterally determines which classification he or she will work and assigns the member to perform that work based on its own preference. In this way, the Employer alone prioritizes the use of skills and controls whether an individual works, for instance, as a Camera Operator, Audio Operator, or Utility on any given day.<sup>20</sup> Similarly, when more crewmembers are available to work in a particular crew classification than the Employer needs, the Employer determines which of them will work at all and breaks the "tie" between the available crewmembers according to its own preference.<sup>21</sup> The

Employer, for example, dictates how much time in advance crewmembers need to report to Target Arena, based on the Employer's perception of how long pre-game duties should take prior to the tipoff. Cf. *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (2015) (finding control factor favors independent contractor status because drywall crew leaders set their own hours and the hours of their crews within the hours set by the general contractor and were authorized to meet project deadlines "in whatever manner they see fit") (emphasis added).<sup>22</sup>

In the present case, we find that the record evidence demonstrates that the Employer retains and exercises a superior right to control what content is to be displayed during each game, which of the available crewmembers will report for each game, what role each individual will occupy within the crew, at what time and where they must report,<sup>23</sup> what specific employer-dictated ad hoc tasks certain classifications may need to accomplish before their work is considered complete, and whether an individual will be removed from the roster and barred from future work as a crewmember. In this way, the Employer holds and exerts control far exceeding that possessed by crewmembers themselves over when and how a crewmember will perform video-production work for it, as well as the manner and means by which that work is accomplished. Given that comparable incidents of employer control were found to be indicative of employee status in *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011), enfd. 822 F.3d 563 (D.C. Cir. 2016), we reach a similar finding here.<sup>24</sup>

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available individuals she thinks is preferable, but makes its ultimate selections consistent with its own order of preference. Cf. *DIC Animation City*, above (writers decide on their own whether to work in teams and who within the team will write each part).

<sup>22</sup> See also *Musical Artists (National Symphony Orchestra Assn.)*, 157 NLRB 735, 741 (1966) (although dancers were ultimately found to be independent contractors, employee status was supported by the fact that employer designated the dates and hours when rehearsals and performances were to take place).

<sup>23</sup> Contrary to our dissenting colleague, the court in *Crew One Productions v. NLRB*, 811 F.3d 1305, 1311 (11th Cir. 2016), did not reject the notion that the power to dictate starting times could indicate employee status. The court rather found that the requirement that stagehands clock in and check out, which was imposed to ensure attendance and to calculate pay, was not so indicative.

<sup>24</sup> The Employer argues that its retention and exercise of control over what the crewmembers produce for the board and how they produce it is in "stark contrast" to the control possessed by the employer in *Lancaster Symphony Orchestra*, above. In that case, although the musicians chose the programs in which they wanted to participate, the employer set the repertoire for each season and retained "the right to control the music to be played in each program, which musicians are selected for it, how the musicians prepare, and how the music is performed." 357 NLRB at 1763. The employer also maintained a list of behavioral guidelines for each performance that imposed a certain dress

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<sup>19</sup> It nevertheless is clear from the record that a significant number of live calls originate from the DLPE, not from the director. It is therefore not the case—as our dissenting colleague suggests—that the Employer "has no control over these matters."

<sup>20</sup> We do not find this evidence offset, as does our dissenting colleague, by the fact that "someone has to make these determinations." Nor do we find employee status in this case "simply because" the Employer makes those decisions.

<sup>21</sup> When there is such a "tie" for the replay operator classification (and possibly other classifications that work in the control room), the Employer generally consults with Ahlstrand to find out which of the

Further, our conclusion that the element of control points toward employee status is consistent with the reasoning set out in *BKN, Inc.*, above. There, the Board found that freelance writers of scripts for a TV show were statutory employees—notwithstanding that they set their own hours, worked out of their homes when drafting and creating scripts, and were not subject to discipline – because the employer “specifie[d] what the writers are to produce from the beginning of the script-writing process until its end, and . . . guide[d] the writers’ performance of their work at every step of the process.” 333 NLRB at 144–145. Although the crewmembers here, similar to the writers in *BKN*, are expected to bring their technical proficiencies and creative abilities to bear in producing live sports content during the Employer’s games, in doing so they are constrained to produce content that conforms to the Employer’s rundown and live game-time calls made by the DLPE. See also *Pulitzer Publishing Co.*, 101 NLRB 1005, 1007 (1952) (cameramen at television station were employees because, although some considerations suggest independent contractor status, their work was directed in detail by the employer’s program, news events, or publicity director, and the employer retained “the right to direct and control the manner in which the cameramen’s work shall be performed”).

Accordingly, for the reasons stated above, we find that the control factor weighs in favor of employee status.

## 2. Whether individual is engaged in a distinct occupation or business

As the Regional Director explained, crewmembers do not conduct business in the Employer’s name or hold themselves out as employees of the Employer. Nor do they receive Employer credentials, handbook, or written guidelines related to their work for the Employer, wear uniforms,<sup>25</sup> or attend Employer meetings or events such as holiday parties. These facts suggest that crewmembers are not well integrated into the Employer’s organi-

zation. Compare *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 2–3 (2015) (canvassers were well integrated into the employer’s organization where they clearly identified themselves as working for the employer through their presentations to prospective donors and the materials they present and distribute); *FedEx Home Delivery*, supra, 361 NLRB No. 55, slip op. at 13 (drivers whose uniforms and logos on their vehicles identified the employer, and who received considerable guidance from the employer and its managers, were well integrated into the employer’s business).

The Petitioner contests the Regional Director’s analysis of this factor on two grounds. First, the Petitioner points out that the Employer does not require crewmembers to carry insurance or otherwise indemnify it, even though, the Petitioner asserts, it is common for independent contractors to maintain their own insurance policies, such as workers’ compensation policies. Although the fact that crewmembers are not required to maintain insurance policies is relevant, we find that this circumstance is partially offset by evidence that three crewmembers have formally registered separate businesses of their own with the State of Minnesota, indicating that certain crewmembers do maintain a “separate identity.”<sup>26</sup> Second, the Petitioner emphasizes that individuals who work in broadcast sports very rarely work for only one employing entity. As the Petitioner notes, it is certainly true that part-time or casual employees covered by the Act often work for more than one employer. “Quite obviously, an individual who works part-time for more than one employer may be eligible to vote in an appropriate unit of each employer’s employees.” *KCAL-TV*, 331 NLRB 323, 323 (2000). See also *Sisters’ Camelot*, above, slip op. at 2. However, while Petitioner is correct that the nature of this industry is such that working for multiple employers does not necessarily suggest inde-

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code and required “good posture and playing positions” and “no talking during bows.” A musician’s unprofessional behavior could (and sometimes did) result in discipline. *Id.* Hence, in *Lancaster Symphony Orchestra*, in view of all the aspects of the relationship between the employer and the symphony musicians, the Board found that the control factor tipped “heavily” in favor of employee status. *Id.*

<sup>25</sup> The Employer provided some of the crewmembers who work as utilities and camera operators with T-shirts stating, “Video Board.” However, it did so at the urging of these crewmembers. The Regional Director also correctly found that the shirts did not identify the Employer in any manner, and we observe that the Employer did not require crewmembers to wear the shirts. We therefore find the Employer’s use of “Video Board” shirts constitutes neutral evidence, pointing in no clear direction for purposes of analyzing whether the crewmembers are engaged in a distinct occupation or business.

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<sup>26</sup> In so finding, we do not rely on the Regional Director’s statement that “the crewmembers clearly possess the infrastructure and support to operate as separate entities,” insofar as the record does not establish that this is true for *all* crewmembers. Even for those crewmembers for whom this statement may be true (i.e., the three who have registered their businesses), we find that any reference to themselves as “freelancers” is not probative of their status under the Act, given that the record reflects that individuals working in the sports-broadcast industry commonly refer to themselves as “freelancers,” and there is no indication that crewmembers who openly call themselves “freelancers” do so with any specific regard for whether the services they perform are rendered as part of an independent business. See *BKN, Inc.*, 333 NLRB at 145 (“so-called freelance artists and designers” are employees absent evidence that they “possess the entrepreneurial discretion to perform their work by their own methods or the ability to increase the compensation received from the [e]mployer while working on projects connected with the production”).

pendent contractor status—this fact does not necessarily constitute persuasive evidence of employee status.

Finally, although there is some evidence that the crewmembers are engaged in a distinct occupation, it is also significant—as our dissenting colleague acknowledges—that the video display on which the crewmembers work is an integrated part of the game experience the Employer provides as part of its business, and not easily separated from the rest of the product that the employer provides.

On balance, there is evidence on both sides of this common law factor. We accordingly find the distinct occupation factor inconclusive.

### 3. Whether the work is usually done under the direction of the employer or by a specialist without supervision

The Regional Director concluded that the supervision-and-direction factor weighs in favor of independent contractor status. The Employer maintains that the Regional Director’s findings as to this factor are correct, while the Petitioner claims that the crewmembers do in fact work under the Employer’s supervision. We find this factor inconclusive.

The Regional Director found that while crewmembers are not required to report to the Employer when they arrive, the Employer places a sign-in sheet in the control room for crewmembers to attest that they reported to work.<sup>27</sup> Further, although the Employer does not evaluate crewmembers’ performance or require crewmembers to submit records of their work performed,<sup>28</sup> the record contains evidence of an instance in which the Employer “disciplined” a crewmember by removing him from the schedule indefinitely. When crewmembers are working a game, the Employer requires that they adhere to the production format specified in the rundown and comply with the directions they receive in live calls.

Although the Employer does not provide the crew with regular or routine supervision over the minute-by-minute performance of their jobs, the Petitioner argues that the “nature of the occupation” must be considered when evaluating the supervision-and-direction factor. We agree. See *Sisters’ Camelot*, above, slip op. at 3 (citing *Mitchell Bros. Truck Lines*, 249 NLRB 476, 481 (1980)). Historically, the Board has been disinclined to place emphasis on an employer’s lack of strict, day-to-day supervision where such supervision is not customary in the profession or where the nature of the work is not reason-

ably amenable to extensive protocols or direction while it is being performed. See, e.g., *AmeriHealth Inc./AmeriHealth HMO*, 329 NLRB 870, 870 fn. 1 (1999); *Michigan Eye Bank*, 265 NLRB 1377, 1379 (1982). See also Restatement (Second) of Agency § 220(1), comment D (full-time cook was regarded as a servant although it was understood that the employer would exercise no control over the cooking). Here, the crewmembers are engaged in fast-paced media and video production during a live sporting event, and in-person supervision over each and every one of them throughout the performance of their work would not be practical.<sup>29</sup> Thus, the fact that the Employer does not substantially supervise the crewmembers while they are working a game is partially explained by the nature of the work that the crew performs for the Employer.<sup>30</sup>

In short, while the Regional Director correctly found that the Employer does not supervise all aspects of the crewmembers’ job performance, we agree with the Petitioner that the Employer effectively supervises some important aspects of their work, much of which simply is not conducive to more immediate, extensive supervision. Accordingly, we find the supervision-and-direction factor inconclusive.<sup>31</sup>

<sup>29</sup> For the same reason, we do not view as significant, as does our dissenting colleague, the crewmembers’ centralized location in the control room or the Employer’s choice not to station a supervising official in the control room to directly oversee them. The DLPE’s ability to view the center-hung board from outside the control room and maintain phone contact with the director through live calls effectively achieves the same purpose.

<sup>30</sup> The Petitioner argues that the Employer’s degree of supervision over the crew is quite substantial when compared to the more minor supervision exerted by other employers over similar types of workers in the sports-broadcast industry at large, and thus that this factor weighs in favor of employee status. See *AmeriHealth, Inc.*, 329 NLRB at 870 fn. 1 (quoting Restatement (Second) of Agency § 220, cmt. 1). In support, however, the Petitioner points only to testimony by Crewmember Babic that the DLPE’s control over her work is more “hands on,” “direct,” and “intense” than the supervision she receives when working in the production field for other entities. Because Babic did not provide specific examples or points of comparison, her testimony is insufficient to establish that the Employer’s supervision over the crew is greater than other employers in this industry.

<sup>31</sup> We thus do not, as our dissenting colleague asserts, treat “aspects of the crewmembers’ situation that are inherent in the nature of their work [as] relevant only if they support employee status.” However, as the Board has noted in *Argix Direct*, 343 NLRB 1017, 1022 fn. 19 (2004), and *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982):

Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.

Our dissenting colleague seizes upon some features that—as we agree—in isolation indicate independent contractor status, but he refus-

<sup>27</sup> The Employer then cross checks the attestations on the sign-in sheet against the invoices that crewmembers submit in order to be paid.

<sup>28</sup> Obviously, however, the crew’s work is broadcast live during each game on the center-hung board and the DLPE is able to observe that broadcast from his position in Target Arena and make live calls.

#### 4. Skill required in the occupation

The Regional Director found that the skills factor weighs “heavily” in favor of independent contractor status. He reasoned that because not all crewmembers are capable of working in all the various production positions, this establishes that the crew performs skilled work. The Regional Director also emphasized that the Employer’s most frequently used director possesses over 30 years of experience directing live-sports broadcasting; the technical directors possess “a fair amount of experience;” camera operators are expected to have proficiency operating the camera to record live sports footage; Thunder operators load content onto a computer, which a layman could not do absent training; audio operators are “expected to be knowledgeable in the role;” replay operators “require a fair amount of replay experience in order to keep up with the fast-moving pace of a live game;” and “[u]tilities must know the proper way to wrap and unwrap cable and assist in the set-up of cable and cameras.” The Regional Director also found that the Employer “typically does not train crewmembers,” that there is only one example of Employer-provided training, and that established crewmembers will train individuals who join the crew.

Contrary to the Regional Director, we find that the “skills” factor is inconclusive. Initially, we reject the Regional Director’s premise that all crewmembers must perform skilled work simply because not all crewmembers are qualified to work in all classifications. Rather, the evidence establishes that some crew-member classifications require a high level of skill and others require a relatively low, more basic level of skill. Accordingly, there is a range of skill levels among the petitioned-for individuals. More specifically, the director, technical director, and camera operators possess a specialized skillset and perform skilled work for the Employer; so do the engineer positions.<sup>32</sup> By contrast, the utility classification is an “entry-level” production position, according to SBPM Nelson, tasked with assisting camera operators by wrapping the heavy camera cables using a specific over-under technique. Although the Regional Director apparently concluded that the utility classification performs skilled work, no evidence shows that Utility work

is anything other than manual labor with a minor technical component. Further, to successfully perform in either the font operator or replay operator classifications, a crewmember need only have basic technical knowledge of computers and an understanding of the sport of basketball. We find that such limited “skills” do not support a finding of independent-contractor status.<sup>33</sup>

Further, although the Employer did establish that a layman “off the street” would be unable to immediately perform with success in many of the crewmember classifications that require heightened technical skills and knowledge of sports broadcasting, the record does not clarify whether the individuals who currently work in such classifications initially joined the crew with the full complement of skills necessary to render those services. For example, it is not clear what level of experience or skill those who work as Thunder operators possessed when they began working for the Employer, given that SBPM Nelson did not work for the Employer when Thunder was installed and no Thunder operators testified. Nor is it clear what level of skill an applicant for work as a Utility is expected or required to have. The same is true for Audio/Tape Operators, Replay Operators, and Font Operators. Given the scant evidence as to the required level of skill, the Regional Director’s conclusion that this factor weighs “heavily” in favor of independent contractor status lacks a proper evidentiary foundation.

The record also supports the Petitioner’s contention that some crewmembers are especially proficient in a classification primarily because they learned it while working for the Employer. SBPM Nelson testified that although the Employer would “for the most part” expect an audio/tape operator to have knowledge of how to perform that role, in at least one instance a crewmember “worked other roles within our crew, gained the trust of us, and has trained on audio as a backup to . . . our main people.” Nelson also testified that when the Employer installed a new replay system, it trained several crewmembers to work in the replay classification. Thus, the fact that several crewmembers have trained on the Employer’s production equipment while at work and gained proficiency demonstrates that crewmembers need not be highly skilled experts when they start working for the

es to recognize other, more significant features that, in this case, militate in favor of employee status.

<sup>32</sup> We note, however, that the commentary in the Restatement (Second) of Agency § 220, which defines the common-law factors we apply here, strongly suggests that while a low degree of skill is an indicator of employee status, a high degree of skill is not always a corresponding indicator of independent contractor status. The Restatement notes that, “Even where skill is required, if the occupation is one which ordinarily is considered . . . an incident of the business establishment of the employer, there is an inference that the actor is a servant.” Comment (i).

<sup>33</sup> Thus, contrary to the Regional Director’s findings, this case is distinguishable from *Porter Drywall*, 362 NLRB No. 6, which involved the status of subcontractors (crew leaders) who all practiced drywall installation as a trade and supervised their own crews of individuals performing drywall installation work. Here, not all crewmembers supervise their own crews, and the various and discrepant skill levels among them easily distinguish this case from the circumstances presented in *Porter Drywall*.

Employer, and may instead gain the requisite skills and mastery while on the job. In other words, the Employer has trained crewmembers to work in classifications requiring skills in addition to those they possessed upon hire, undercutting an inference that individuals become members of the crew by selling their high-level skills and expertise on the open market.<sup>34</sup> Cf. *Sisters' Camelot*, above, slip op. at 4 (that employer provided workers with the training necessary to perform the work supported finding employee status). See also *NLRB v. United Insurance Co.*, 390 U.S. at 258–259 (agents lacked prior experience and were trained by company personnel, which supported employee status).

Finally, as further discussed below, we find that the crewmembers' skills in producing content for the center-hung board are essential to the Employer's ability to achieve its business objective of providing an overall entertainment experience for its customers. Thus, the Employer does not enlist the crewmembers' skills to accomplish some ancillary task, such as remodeling its offices, but to accomplish its core mission.

In sum, although some crew positions require a high degree of skill, the lower-skilled positions, the evidence of Employer-provided training to crewmembers, and the alignment of the crewmembers' skills with the Employer's core business objective lead us to conclude that this factor does not weigh conclusively in any direction.<sup>35</sup> As such, we find this factor inconclusive.

#### 5. Whether the employer or individual supplies instrumentalities, tools, and place of work

The Regional Director found that this factor weighs somewhat in favor of employee status. The Petitioner, however, argues that this factor deserves greater weight than the Regional Director gave it. We agree with the Petitioner.

As the Regional Director noted, crewmembers, other than the Engineer in Charge, do not utilize any of their own tools while working for the Employer.<sup>36</sup> Instead, the

Employer supplies all of the necessary production equipment and instrumentalities, including cameras, cables, instant replay machines, sound and other broadcasting equipment, headsets, the center-hung board itself, and all of the furnishings in the control room such as tables and chairs. This is so despite the fact that some of the most crucial equipment that certain crewmembers use is portable—video cameras and cables, for instance. Thus, this case is clearly distinguishable from others where individuals rendering artistic and/or technical services for an employer supplied some or all of their own tools and supplies. Cf. *Lancaster Symphony Orchestra*, 357 NLRB at 1766 (tools-and-instrumentalities factor pointed in no clear direction where “musicians supply their own instruments and clothes, but the Orchestra supplies music, stands, chairs, and the concert hall”); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (independent-contractor status of models for college art classes is supported by evidence that “the models supply their own robes and slippers and are sometimes requested to bring costumes,” and “[i]f they prefer to use padding, poles, and other equipment to support their poses, the models supply those items themselves”); *La Prensa, Inc.*, 131 NLRB 527, 531 (1961) (photographer hired by newspaper company is independent contractor where, inter alia, the company built a darkroom on its premises and installed a dryer, but otherwise the photographer provided all of his own equipment and supplies).<sup>37</sup>

Accordingly, absent meaningful countervailing evidence, we find this factor weighs heavily in favor of employee status.

#### 6. Length of time for which individual is employed

The Regional Director found the length-of-time factor favors employee status. We agree. As he explained, many of the crewmembers have performed work for the Employer for many years, season after season. Half of the crewmembers have worked for the Employer since at least October 2012.<sup>38</sup> Once a crewmember begins per-

<sup>34</sup> That the Employer was able to provide this training to a number of employees is further confirmation that the skills at issue are central to the Employer's business. The fact that the actual training was given by fellow crewmembers, which our dissenting colleague finds significant, is irrelevant: the training and associated promotions would clearly not have occurred without the Employer's approval.

<sup>35</sup> Accordingly, we do not, as our dissenting colleague asserts, “refuse to give any weight to the presence of a skill requirement simply because doing so will lead to a finding that disputed individuals are independent contractors.” We rather find that the particular skill requirements here, given the nature of the Employer's business, do not clearly support either independent contractor or employee status.

<sup>36</sup> As noted above, the Engineer in Charge (Sean Nottingham) brings hand tools for his own use which other crewmembers sometimes use. The hand tools are not part of the equipment the crewmembers operate for the Employer. In any event, only 1 person on the Employer's 51-

person roster brings any of his or her own tools, and even during games when Nottingham is working, 15 out of 16 crewmembers report to Target Arena without any of their own tools or equipment.

<sup>37</sup> Further, without exception, the Employer is the sole supplier of the crewmembers' place of work, which consists of Target Arena and the control room therein. This evidence also favors employee status. *Sisters' Camelot*, above, slip op. at 3 (factor favored employee status where employer chooses the place of work each day, workers had little to no influence over their assignments, and employer provided all the necessary equipment and materials with the sole exception of pens, which the workers provided); *Lancaster Symphony*, 357 NLRB at 1766 (employer's provision of concert hall favors employee status).

<sup>38</sup> More specifically, 11 of the regularly scheduled crewmembers have worked for the Employer for 7 or more years. Crewmember Babic has worked for the Employer for over 18 years.

forming work for the Employer and becomes a regular part of the crew, the Employer will generally ask her to continue the following season. This “potentially long-term working relationship” favors employee status. *Sisters’ Camelot*, above, slip op. at 4. See also *NLRB v. United Insurance*, 390 U.S. at 259 (employee status supported by “permanent working arrangement . . . under which they may continue as long as their performance is satisfactory”).<sup>39</sup> For these reasons, and in the absence of any argument to the contrary, we agree with the Regional Director that this factor favors employee status.

#### 7. Method of payment

The Regional Director found this factor inconclusive, and we agree, although for somewhat different reasons. To begin, we agree with the Regional Director that several facts tend to favor independent contractor status: the Employer does not withhold taxes or provide the crew with any additional benefits; crewmembers complete W-9 and 1099 forms for tax purposes; and the Employer makes no withholdings from their checks.<sup>40</sup> On the other hand, as the Regional Director found, the Employer unilaterally implemented a procedure beginning with the 2015–2016 season under which it pays crewmembers a “per game” rate, which varies according to the skill-level and requirements of the particular position.<sup>41</sup> The Employer determines the per game rate, but one crewmember, Jackie Gambaiani, was able to secure a higher rate for the 2015–2016 season than the Employer originally offered her. (We note that the rate the Employer initially offered Gambaiani, however, would have resulted in lower compensation than she earned the prior season under the hourly-pay method.) On balance, we agree with the Regional Director that the Employer’s unilateral

establishment of a per game rate weighs in favor of employee status, although evidence that one crewmember was able to negotiate a higher rate slightly undercuts that inference.<sup>42</sup>

We do not, however, agree with the Regional Director’s further finding that the Employer’s method of paying the crewmembers per game, combined with evidence that they have some control of their schedules and how many games they will work, is most properly analogized to the situation in *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847.<sup>43</sup> In that case, the Board found that evidence that college art class models were paid a flat fee per class—not by the hour or on a salary basis—indicated independent contractor status because the models alone decided whether to work for the employer during a semester and, if they chose to do so, they exercised total control over their own schedules by deciding how many classes to accept and what hours they would work. *Id.* In the present case, however, although crewmembers are paid by the game, it is clear that their rates correspond to the number of hours worked, as the Employer will pay them a mutually agreeable special rate for games that are longer than usual, such as a home opener game when the call time is earlier or a game that goes into

<sup>39</sup> See generally *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984) (“open-ended duration” of worker’s relationship with employer weighs in favor of employee status).

<sup>40</sup> Our dissenting colleague finds that these facts not only favor independent contractor status but are highly significant here. While we agree that they support independent contractor status in isolation, we note again that “[n]ot only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors.” *Argix Direct*, supra, 343 NLRB at 1022 fn. 19 (2004); *Austin Tupler Trucking*, supra, 261 NLRB at 184.

<sup>41</sup> Previously, the Employer paid crewmembers on an hourly basis. The Regional Director failed to note that the Employer continues to pay the Engineer in Charge on an hourly basis and it sometimes compensates the Engineer 2 using an hourly rate. With respect to the Engineer in Charge, SBPM Nelson explained that “[i]f there is a concert or something at Target Center before a game, engineering would be required to do more things and more setup,” so the Engineer in Charge would be there for “a longer time.” Thus an hourly rate better accommodates the game-by-game variations in the work these classification are required to perform. It is well established that payment by an hourly rate is suggestive of employee status.

<sup>42</sup> To be paid for a game, as noted above, the Employer requires crewmembers to submit an invoice, and if a crewmember does not submit an invoice in a timely manner she may not be paid until the following month. The Regional Director considered this invoicing arrangement to weigh in favor of independent-contractor status. See *BKN, Inc.*, 333 NLRB at 144 (fact that writers were paid per episode pursuant to invoices submitted to the employer suggested independent contractor status). The Petitioner argues that the invoicing requirement is merely another example of the Employer’s administrative control over its relationship with the crew and in no way indicates independent contractor status. But the Petitioner concedes in its brief, and we find, that the Employer treats the crewmembers as independent contractors for payroll purposes. Nonetheless, we place greater weight on the Employer’s near-unilateral authority over the method of paying the crewmembers and the generally non-negotiable establishment of compensation rates as considerations militating against finding independent contractor status. E.g., *Sisters’ Camelot*, above, slip op. at 4 (in assessing method of payment factor, “the critical consideration . . . is [the employer’s] tight control over [the canvasser’s] compensation”); see also *FedEx*, 361 NLRB No. 55, slip op. at 14; *Lancaster Symphony Orchestra*, 357 NLRB at 1765–1766.

<sup>43</sup> We agree with the Regional Director that the method of pay at issue in the instant case is readily distinguishable from the method in *FedEx*, 361 NLRB No. 55, slip op. at 6 (drivers received a weekly settlement check based on, inter alia, the number of packages delivered and stops made, and could potentially earn various bonuses and additional incentive-based payments); *Sisters’ Camelot*, above (canvassers for nonprofit organization were paid a commission correlated to the amount of donations they collected while canvassing); and *Porter Drywall*, 362 NLRB No. 6, slip op. at 3 (drywall installation crew leaders were paid weekly on a project basis).

overtime.<sup>44</sup> This payment arrangement distinguishes this case from *Pennsylvania Academy*, above, and more closely resembles the payment method used by the employer in *Lancaster Symphony Orchestra*, above, where the musicians were paid by the job (either a rehearsal or concert) but received additional compensation for each 15 minutes that a performance exceeded 2.5 hours. 357 NLRB at 1765–1766. The fact that the musicians were “paid based on the time they spend working for the Orchestra,” the Board found, was indicative of employee status. *Id.* at 1766. Here too, crewmembers are, in effect, paid based on the time they spend working for the Employer, which is more suggestive of an employment relationship than an independent contractor relationship.

Furthermore, unlike the Regional Director, we do not perceive a crewmember’s decision whether to work a game to be an exercise of her “control” over her earnings; nor is she exercising “business judgment” or taking “financial risks” simply by identifying the games of the season for which she will be available. To the contrary, although crewmembers may make themselves available for certain games, their earnings depend almost completely on the exercise of control by others. The NBA and the WNBA control the dates and times of games. The Employer alone determines which crewmembers will work which games and in which particular classifications. The Employer also controls the call time, and no one controls when a game will end. In those circumstances, there is no way for crewmembers to self-manage their game duties in order to perform other jobs during the time period required for a game. In other words, as the Regional Director acknowledged, there is no way for a crewmember to increase her earnings while working one of the Employer’s games. At best, crewmembers may increase their earnings by making themselves available for more games or for employment by additional employers at other times. But, as the Board stated in *Lancaster Symphony Orchestra*: “The choice to work more hours or faster does not turn an employee into an independent contractor.” 357 NLRB at 1765. Such is the case here.<sup>45</sup>

<sup>44</sup> Our dissenting colleague is therefore incorrect in asserting that most crewmembers are paid on a per-game basis “regardless of how long each game lasts.” As he later concedes, the Employer “would negotiate a rate with every crewmember for games that ran longer than usual.”

<sup>45</sup> Our dissenting colleague argues that the Employer’s invoice and direct-deposit system for paying crewmembers are inconsistent with employee status, citing two Minnesota statutes embodying employee pay requirements. However, Minn. Statute § 177.23’s time and payday requirements are clearly oriented to employees who work on regular schedules rather than on a per-event basis; and in any event the record does not indicate that the Employer’s pay system fails to meet those

That said, although we disagree with some aspects of the Regional Director’s rationale, we ultimately agree that evidence relevant to this factor cuts both ways. We therefore find that the method-of-payment factor is, on balance, inconclusive.

#### 8. Whether the work is part of the regular business of the employer

The Regional Director found that “[t]he Employer’s core business is the performance of NBA or WNBA games,” and that the crew’s work is not a regular or essential part of the Employer’s business because it is “undisputed” that games would proceed as scheduled if the center-hung board were not operational. The Petitioner argues that the Regional Director erred by failing to acknowledge that the center-hung board is an important feature of the experience that fans receive when they attend a home game. The Employer, asserting that its business is limited to “professional athletics,” argues that the Regional Director properly analyzed this factor because the crew’s work is not critical to whether a basketball game is played. We find the Petitioner’s argument more persuasive.

The Board has stated that this factor will favor employee status where the disputed individuals perform functions that are an essential part of the employer’s business. *FedEx*, 361 NLRB No. 55, slip op. at 14; *Roadway Package System, Inc.*, 326 NLRB at 851. In this case, it is clear from the record that the Employer’s business of presenting professional basketball games does not, as the Regional Director suggests, encompass only on-the-court action. Plainly, as our dissenting colleague agrees, the business of professional basketball in this day and age includes elements beyond the game played on the court that are critical to the Employer’s overall financial success and the success of the game itself, regardless of which team wins. In particular, by SBPM Nelson’s own admission, the Employer’s business goals include encouraging fans to attend home games and creating an enjoyable and entertaining experience for audience members at Target Arena. Generating revenue from ticket sales, merchandise sales, sponsorships, and advertising, and promoting its basketball teams and the players on those teams, are also plainly among the Employer’s central business concerns. It is beyond dispute

requirements. Minn. Statute § 181.101’s requirement that employees consent to direct deposit only raises the possibility that the Employer is not in compliance with that requirement. *Brennan v. Quest Communications International, Inc.*, 727 F.Supp.2d 751, 762 (D. Minn. 2010), also cited by our dissenting colleague, addressed an employee’s evidentiary burden in establishing a claim under the Fair Labor Standards Act and an employer’s record-keeping obligations related to that burden; it has no application here.

that these functions are now, along with the athletics contests themselves, essential to the financial success of professional athletic teams. And one of the key ways the Employer accomplishes those objectives is by using the center-hung board during home games to air live footage and replay footage, display recordings of audience members, advertise and promote products, services, events, and other revenue generating content, and establish a record of the game.<sup>46</sup>

Based on this evidence, we find that the core function of the Employer's business is not limited to playing basketball games, but also includes providing entertainment services and a variety of revenue-generating content through electronic media, including the content displayed on the center-hung board. Consequently, the crew's work broadcasting the video display of that content on the board during home games and (in the Regional Director's words) "enhanc[ing] the overall entertainment experience for audience members" is, contrary to the Regional Director, an essential component of the Employer's business. For those reasons, we find that the work of the crewmembers clearly is part of the regular business of the Employer.

In concluding otherwise, the Regional Director appears to have based his analysis largely on opinion testimony from SBPM Nelson and crewmember Babic that either of the Employer's basketball teams would still play a game as scheduled even if the center-hung board were not operational.<sup>47</sup> There is no indication in the record that this has ever occurred at Target Arena. But more important, we find that even assuming that a scheduled basketball game would go forward absent an operational center-hung board, this circumstance is insufficient to establish that the crew's work is not part of the Employer's regular business in light of the considerations discussed above.

Accordingly, we find this factor weighs in favor of finding that the crewmembers are employees.

#### 9. Whether the parties believe they are creating an independent contractor relationship

The Regional Director found that there is insufficient evidence to conclude that the parties intended to enter into an independent contractor relationship. We agree,

<sup>46</sup> In fact, the Employer has made a significant investment in its ability to produce its own basketball-related videos and media content in an in-house video department. That department employs a Senior Broadcast Production Manager (SBPM), a Director of Live Programming and Events (DLPE), and approximately 10 admitted employees who create promotional video material and other electronic media for the Employer.

<sup>47</sup> The Employer echoes this reasoning in its brief on review, arguing that because the crewmembers do not play basketball and because the basketball players would still play a game if the center-hung board "went down," the crew's work is not part of its regular business.

and note that neither the Employer nor the Petitioner presented a contrary argument in their briefs on review. Thus, as the Regional Director found, this factor is inconclusive for purposes of determining the crewmembers' status under the Act.

#### 10. Whether the principal is or is not in business

The Regional Director found that this factor favors independent contractor status. He noted that although the Employer has its own in-house video department staffed with admitted employees, that department does not produce content solely for the center-hung board. He went on to find that the Employer's overall business is much broader than just video production. The Petitioner does not argue that the Regional Director erred in this respect, but instead asserts that this factor is of little consequence relative to the numerous other factors which it contends weigh in favor of employee status. Contrary to the Regional Director, we find that this factor favors employee status.<sup>48</sup>

As discussed above—and, again, as our dissenting colleague concedes—the evidence establishes that the Employer's business goes well beyond presenting profes-

<sup>48</sup> We observe that the Board and some other tribunals have analyzed this factor by assessing whether the principal is *in the business*—i.e., the *same* business as the disputed individuals. For example, in *FedEx*, the Board reasoned that because the employer was engaged in the *same* business as its drivers, this factor favored employee status. 361 NLRB No. 55, slip op. at 15 (citing *Community Bus Lines/Hudson County Executive Express*, 341 NLRB 474, 475 (2004)). Accord *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4–5 (considering the employer's "ultimate business purpose" in assessing this factor); *Porter Drywall*, 362 NLRB No. 6, slip op. at 5 (finding the employer "is engaged in the same business as the crew leaders, and this factor weighs in favor of employee status"). By contrast, other tribunals have analyzed this factor by assessing merely whether the principal is "in business" at all (such as for purposes of determining a principal's third-party liability). Sec. 220(2)(j) of the Restatement (Second) of Agency itself frames the relevant consideration as simply "whether the principal is or is not in business." Further, we take notice that some courts—albeit not in cases addressing whether individuals are employees under the Act—have deemed the relevance of this factor "obscure" and treated it as either distinguishing between a business and a non-business or just a duplication of the common-law factor that asks whether the work at issue is part of the employer's regular business. Compare *Martinez v. Miami-Dade County*, 32 F.Supp.3d 1232, 1239 (S.D.Fla. 2014), aff'd. sub nom. *Blue Martini Kendall, LLC v. Miami Dade County, Florida*, 816 F.3d 1343 (11th Cir. 2016) (quoting *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061, 1066 (Fla. Dist. Ct. App. 1987)) ("[T]he relevance of this factor is obscure. . . . Thus, little weight is afforded to this factor"); with *In re Supplement Spot, LLC*, 2009 WL 2006834, at \*17 (Bankr. S.D. Tex. 2009) (using same analysis as would apply to determine whether or not the work is a part of the employer's regular business). It is not necessary to resolve this issue in the present case, however, because the Employer obviously is engaged "in business" and, as discussed above and below, the evidence shows that the Employer's business includes providing video content as part of its presentation of professional basketball games.

sional basketball games. Rather, as SBPM Nelson admitted, the Employer's business is to provide an entertainment experience for audience members at Target Arena, and the evidence shows that a key element of that experience is the content displayed on the center-hung board throughout home games. That fact holds true regardless of whether other components of the Employer's business do not depend on the center-hung board, and regardless of whether the in-house video department provides content only for the center-hung board. For those reasons, we find that the Employer not only is "in business," but that it is in the same business as the crewmembers of showing video content on that board.

11. Whether the evidence shows that the individual is rendering services as part of an independent business

In addition to the factors listed in the *Restatement*, the Board also considers the extent to which a putative contractor is, in fact, rendering services as part of an independent business with an actual (not merely theoretical) entrepreneurial opportunity for gain or loss. *FedEx*, above, slip op. at 1. In performing this analysis, the Regional Director found that the crewmembers work for multiple employers and control how often they work for the Employer, and that these circumstances constitute "strong evidence of actual entrepreneurial opportunity." However, he went on to find that because crewmembers lack any proprietary or ownership interest in their work and do not have control over important business decisions, this factor is inconclusive. The Petitioner argues that the ability of crewmembers to work for other employers has little if any significance in this case and that crewmembers do not have any actual entrepreneurial opportunity for gain or risk of loss when they are producing media content for the Employer. Contrary to the Regional Director, we agree with the Petitioner that this consideration favors employee status.

In *FedEx*, the Board explained that the independent-business consideration depends on the specific work experiences of the disputed individuals and encompasses whether those individuals (a) have a realistic ability to work for other companies; (b) have proprietary or ownership interest in their work; and (c) have control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital. *Id.*, slip op. at 12.

Here, it is clear that many of the crewmembers – if not all—work for other employers, and that it is "industry practice" for them to do so. We agree with the Regional Director that this evidence would be consistent with an inference that crewmembers work for the Employer with a measure of entrepreneurial opportunity. In the alterna-

tive, however, it may be fairly inferred—particularly in the absence of evidence to the contrary—that the primary reason that crewmembers work for multiple employers is the simple fact that professional basketball games occur on a seasonal and intermittent basis. This makes exclusive employment with the Employer for the crew unrealistic. The Board has observed "that employees in certain industries, such as the entertainment industry, typically have intermittent working patterns . . . ." *Lancaster Symphony Orchestra*, 357 NLRB at 1765. Although our analysis includes the factor of work for other employers, this factor's significance is diminished where employment in the relevant industry is consistently part-time. *Sisters' Camelot*, supra, 363 NLRB No. 13, slip op. at 5; *Lancaster Symphony Orchestra*, supra, 357 NLRB at 1765. In this case, having considered the evidence that crewmembers do have the opportunity to work for other employers, we find that that circumstance is plainly outweighed by the other independent-business considerations favoring employee status.

In particular, as the Regional Director found, crewmembers do not have any proprietary interest in their work for the Employer. Crewmembers produce video content with the Employer's equipment that becomes NBA or WNBA property,<sup>49</sup> and they are not allowed to retain a copy of the footage of an important game in order to sell or license it to any other entity. Nor is there any indication that a crewmember can assign or sell her role within the crew for a particular game. See *BKN, Inc.*, 333 NLRB at 145 (writers had no substantial proprietary interest and no significant entrepreneurial opportunity for gain or loss when writing scripts for employer). In addition, as the Regional Director found, crewmembers have no control over any important business decisions concerning the unit's work and have no involvement in developing the business strategy concerning what is displayed on the center-hung board. Crewmembers control their availability for particular games,<sup>50</sup> but

<sup>49</sup> We accordingly do not, as our dissenting colleague asserts, "disregard the nature of the work performed by the crew" in assessing their entrepreneurial opportunity.

<sup>50</sup> With respect to evidence that if a crewmember wants to cancel a game, he may do so without repercussion (although he must find his own replacement from the roster, as noted), we reject the Regional Director's implication that this shows crewmembers are involved in the selection or assignment of employees. Instead, it is the Employer who has sole control over who is listed on the roster, which specifically delineates in which classifications each individual (including a listed replacement) is qualified to work.

Further, the fact that the Employer promulgates and has unilaterally changed the replacement-selection process is a feature of the relationship that suggests the crewmembers are employees, and not independent contractors. See *FedEx*, above, slip op. at 15 (quoting *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000)); *NLRB v. United Insurance*

they have no further control over the specific hours that they work. Instead, the basketball leagues set the games' start times; the Employer dictates the crewmembers' call times; and the crew stays at Target Arena at least until the game is complete. Crewmembers do not invest capital in order to perform work for the Employer. With the exception of one individual, they also do not purchase or use any of their own tools or equipment.<sup>51</sup> These considerations demonstrate that the crewmembers are not rendering video-production services for the Employer as part of their own independent businesses.

It is true that 3 crewmembers—out of a roster of 51 individuals in total—operate their own companies and have chosen to invoice the Employer for their work under the auspices of those companies. But given that even those crewmembers lack control over the Employer's business decisions and have no proprietary interest in their work for the Employer, this ministerial choice of billing form does not establish that these or other members of the crew perform services for the Employer as part of independent businesses.<sup>52</sup>

It is also true, as our dissenting colleague emphasizes, that the Employer does not place constraints on the ability of crewmembers to pursue other job opportunities when they are not working at the Employer's games. This, however, is also consistent with part-time employment. Considering the record evidence as a whole, the fact that a crewmember is empowered to decide not to work a particular game, and that she may work for another employer during such time, does not mean she enjoys an opportunity for entrepreneurial gain suggestive of independent contractor status. Again, as the Board stated in *Lancaster Symphony Orchestra*:

The choice to work more hours or faster does not turn an employee into an independent contractor. To find otherwise would suggest that employees who volunteer for overtime, employees who speed their work in order to benefit from piece-rate wages, and longshoremen who more regularly appear at the “shape up” on the docks would be independent contractors. We reject that notion.

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*Co.*, 390 U.S. at 259 (employee status supported by fact that terms and conditions under which disputed individuals work are “promulgated and changed unilaterally by the company”).

<sup>51</sup> As noted above, Engineer in Charge Nottingham brings his own tools.

<sup>52</sup> See *FedEx*, above, slip op. at 4, 13 (unit of drivers found to be employees included three drivers who chose to incorporate as independent businesses).

357 NLRB at 1765.<sup>53</sup> By that same token, in *Sisters' Camelot*, the Board considered that the fact that the canvassers could and often did work for other employers when they were not actively working for Sisters' Camelot was indicative only of their part-time work schedules and “has little bearing on whether canvassers are employees or independent contractors.” 363 NLRB No. 13, slip op. at 5. See also *BKN, Inc.*, 333 NLRB at 145 (finding it appropriate to take into account the animation industry's irregular patterns of employment, which serves to explain “the absence of some of the usual indicia of employee status”). Here, too, the fact that crewmembers may make themselves available for as many or as few games as possible during the basketball season does not make them independent contractors, but instead makes them analogous to employees who do or do not “shape up” more regularly, or who work part-time in industries where the working patterns are intermittent and the hours of work are not typical.

The above considerations demonstrate that crewmembers do not, in fact, operate as part of independent businesses or with actual entrepreneurial opportunity within the meaning of *FedEx*. Accordingly, we find that the independent-business consideration favors employee status.

#### IV. CONCLUSION

The Employer has the burden of establishing that the crewmembers are independent contractors. We find that it has not carried its burden. Critically, the crewmembers work for the Employer at times and locations determined and provided by the Employer, using tools, equipment, and supplies that, almost without exception, the Employer provides. Once an individual begins working as a crewmember, the Employer allows and expects that individual to work for it the following season, and a majority of the crew has worked for the Employer since at least October 2012. Provision of entertainment services is at the core of the Employer's professional-basketball business, and the crew's work during home games is the very essence of this critical function of the Employer's operation. Although the Employer treats the crewmembers for taxation and payroll purposes as if they are independent contractors, it also, with only one exception, unilaterally sets their compensation, which is closely based on the amount of time spent working a game. Some crewmembers are highly skilled with technical backgrounds, while other crew positions require virtually no heightened

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<sup>53</sup> Significantly, in enforcing the Board's Order, the District of Columbia Circuit appears to have agreed that focusing too heavily on evidence showing that the disputed individuals may freely decline work and may freely work for other employers “might lead to almost automatic classification of many part-time workers as contractors.” *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d at 570.

skills to perform at entry level, and the Employer has a practice of training crewmembers to enable them to work in positions for which they would, absent such training, be unqualified. Crewmembers are free to designate the games they would like to work, but when more individuals want to work a game than the Employer needs, the Employer determines who works according to its own order of preference, and once a crewmember capable of working in multiple classifications commits to work, the Employer places her in the classification it prefers. During all games, crewmembers carry out the technical aspects of their jobs without direct supervision, but they must adhere to a script, which is unique to each game and created solely by the Employer, and they must follow the Employer's "live call" directions. The Employer retains the right to assign all crewmembers tasks and to control the manner and means by which they perform their work. While crewmembers are free to work for other employers and three of them have incorporated their own business entities, the evidence fails to establish that crewmembers render services to the Employer as part of independent businesses, insofar as crewmembers have no proprietary interest in their work for the Employer, are not involved in the Employer's business decision-making, and have been subject to unilateral changes the Employer has made in important terms and conditions of their work.

In sum, the weight of the evidence in this case demonstrates that the Employer has not carried its burden to establish that the crewmembers are independent contractors. Indeed, we would reach that conclusion even assuming that the factors we have found inconclusive were counted in favor of independent contractor status. Accordingly, we find that the crewmembers are statutory employees within the meaning of Section 2(3) of the Act.

#### ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. August 18, 2017

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
CHAIRMAN MISCIMARRA, dissenting.

Minnesota Timberwolves Basketball, LP (Timberwolves Basketball) owns and operates two professional basketball teams: the NBA Minnesota Timberwolves

and the WNBA Minnesota Lynx. Both teams play home games at Target Arena in Minneapolis. The petition at issue in this case seeks a unit of video technicians who operate a four-sided video display hung over the center of the Target Arena basketball court. The video display shows live content from the games as they progress, replay footage, real-time game statistics, advertisements, other graphics and fonts, and some preproduced video material. Timberwolves Basketball produces the content that appears on the video display using a crew of 16 technicians, who are drawn from a call list of about 30 persons (crewmembers).<sup>1</sup>

The Regional Director dismissed the petition on the grounds that the crewmembers are independent contractors rather than employees under Section 2(3) of the Act. My colleagues reverse this finding. Because I believe that the Regional Director correctly concluded that the disputed individuals are independent contractors, I respectfully dissent.

#### Analysis

The Section 2(3) definition of the term *employee* expressly excludes "independent contractors." The Supreme Court long ago established that the "independent contractor vs. employee" determination must be based on the common law of agency. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). No one common-law factor by itself is determinative. *Id.* The following non-exclusive list of factors governs this determination:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

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<sup>1</sup> The crew for each game is composed of one director, one technical director, one engineer in charge, one engineer, one audio/tape operator, one Thunder computer operator, one font operator, three replay operators, three camera operators, and three utilities.

Restatement (Second) of Agency § 220(2) (1958); see *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–326 (1992).

In *FedEx Home Delivery*, 361 NLRB No. 55 (2014) (*FedEx II*), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), petition for rehearing en banc denied No. 14-1196 (June 23, 2017), the Board reiterated that all 10 factors must be considered and that they should be assessed along with consideration of whether the relationship offers “significant opportunity for entrepreneurial gain or loss.” *Id.*, slip op. at 3. However, former Member Johnson criticized the Board majority’s independent contractor analysis in *FedEx II*—which resulted in a finding that the petitioned-for individuals there were employees, not independent contractors—based on his view that the majority had wrongly “diminished the significance of entrepreneurial opportunity and selectively overemphasize[d] the significance of ‘right to control’ factors relevant to perceived economic dependency.” *Id.*, slip op. at 20; see generally *id.*, slip op. at 20–33 (Member Johnson, dissenting). On appeal, the Court of Appeals for the D.C. Circuit refused to defer to the Board majority’s finding of employee status, based on the court’s view that the majority had impermissibly refused to follow the court’s materially indistinguishable decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (*FedEx I*). See 849 F.3d at 1127–1128. I have previously expressed my agreement with former Member Johnson’s criticisms of the expanded employee definition applied in *FedEx II*.<sup>2</sup>

In the instant case, when the common law factors are properly applied, I believe that the record supports a finding that the crewmembers are independent contractors, not employees.

1. *Extent of Control.* The crewmembers control most aspects of the details of the work they perform, which supports a finding that they are independent contractors. Timberwolves Basketball Director of Live Programming and Entertainment Chad Folkestad creates a “run-down” for each game that directs minor non-game elements like the “kiss-cam.” Once the game begins, however, the director, who is part of the crew, decides what the cameras will shoot, what feed from the television trucks will be displayed, and other aspects of the live coverage.<sup>3</sup> These live calls take precedence over the run-down. Timberwolves Basketball has no control over these matters, and such lack of detailed control is compelling support for finding the crewmembers to be independent con-

tractors. See, e.g., *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (2015) (finding that control factor, especially discretion in how to complete work, supports independent contractor status); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (finding models to be independent contractors given their discretion in how to achieve results).

Games are scheduled by the NBA or WNBA, not Timberwolves Basketball, which has no control over when the game starts or how long it lasts. Timberwolves Basketball does not assign crewmembers to work particular regular season games; instead, Timberwolves Basketball Senior Broadcast Production Manager Erik Nelson sends all crewmembers a schedule of games prior to the start of each season and asks them to indicate their availability for those games. There is no requirement that these individuals work a minimum or maximum number of games. See, e.g., *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305 (11th Cir. 2016), denying enf. to 361 NLRB No. 8 (2015) (freedom to accept or reject work assignments is a telling characteristic of independent contractors); *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (same).<sup>4</sup>

My colleagues find that this factor supports employee status, and they emphasize the role played by Folkestad in creating the run-down. With all due respect to my colleagues, I believe that they have missed the forest for the trees. The relevant issue is whether Timberwolves Basketball controls “the details of the work”; evidence that Timberwolves Basketball controls the ultimate end to be achieved is not only consistent with independent contractor status, but entirely to be expected. See *DIC Animation City*, 295 NLRB 989, 991 (1989) (no right of control where animation studio determined end product, through specification of characters, goals, and tone of series, where writers create the story idea, the premise, the outline, and the script); *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486, 490 (8th Cir. 2003) (“Work by independent contractors is often, if not typically, performed to the exacting specifications of the hiring party.”). Here, the limited instances in which Folkestad determines what the crewmembers will do are substantially outweighed by the far more frequent directions they receive from the Director, who is a crewmember.<sup>5</sup>

<sup>4</sup> The court of appeals denied enforcement of the Board majority’s finding in *Crew One* that the disputed stagehands were employees of the company that referred them to jobs. I relevantly dissented in *Crew One*, and I agree with the court’s assessment of the case and its conclusion that the stagehands were independent contractors.

<sup>5</sup> Crewmember JoAnn Babiec testified that “in the control room, the majority of what we’re doing is covering the actual game.” (Tr. 211–212.)

<sup>2</sup> See *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 26 fn. 24 (2015) (Members Miscimarra and Johnson, dissenting).

<sup>3</sup> Timberwolves Basketball uses the same individual, Kari Ahlstrand, as director whenever she is available.

Nor is it determinative that Nelson plays a limited role in selecting crewmembers for particular games and assigning roles when necessary. It is true that if more crewmembers indicate an interest in a game than are needed, Nelson determines who will be selected for the game. And when a crewmember is qualified for more than one position, Nelson determines the position they will work during the game. But someone has to make these determinations. I believe it is unreasonable to find employee status simply because Timberwolves Basketball retains the right to determine how many crewmembers will work a given game and to resolve conflicts over roles and competing requests for work.<sup>6</sup>

Finally, the majority notes that Timberwolves Basketball can remove individuals from the roster of persons eligible to work as part of the crew, and they note that Timberwolves Basketball did so on one occasion after receiving complaints from other crewmembers that the individual lacked professionalism. Notably, there is no indication that Timberwolves Basketball independently investigated the incident before taking this action. Contrary to my colleagues, this episode neither reveals control over “the details of the work” nor shows that Timberwolves Basketball has the right to discipline crewmembers. To the contrary, the rights to select which individual will provide services and to terminate that relationship are inherent in every independent contractor arrangement. It defies reason to find that the exercise of these rights demonstrates employee status.<sup>7</sup>

2. *Distinct Occupation or Business / Whether Principal Is In Business/Regular Business of the Employer.* The primary business of Timberwolves Basketball is the operation of NBA and WNBA franchises. While the video display is clearly an important part of the game experience Timberwolves Basketball strives to present as part of its business operations, Nelson and crewmember Babiec testified without contradiction that the games would be played even if the video board was not operational. It is equally clear that the crewmembers perform

similar services for other businesses, consistent with industry practice, and that several of them provide services under the name of their own business. Overall, I believe that these factors slightly favor employee status.<sup>8</sup>

3. *Supervision.* Crewmembers work under the direction of the Director during games. Timberwolves Basketball does not directly monitor the work of crewmembers, nor does it issue them evaluations. Timberwolves Basketball maintains a handbook establishing policies applicable to its employees, but crewmembers are not issued this handbook nor are they subject to its provisions. Crewmembers sign in when they arrive, but they are not required to keep records of their work. As the Regional Director found, these facts all support independent contractor status. See *Crew One Productions*, supra, 811 F.3d at 1311 (fact that stagehands were required to check in and out did not indicate employee status); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (fact that television script writers set own hours and were not subject to discipline supported independent contractor status).

My colleagues nevertheless find this factor inconclusive. They cite the sign-in requirement as evidence of supervision, along with the direction provided in the rundown and Timberwolves Basketball’s “discipline” of a crewmember by removing him from the schedule. I disagree with my colleagues’ reliance on these findings for the reasons stated above. My colleagues implicitly acknowledge that Timberwolves Basketball’s supervision is limited in any case, but they give no weight to that fact because, in their view, the “work is not conducive to more immediate, extensive supervision.” No evidence supports this view. To the contrary, the crewmembers all report to a single facility, and 10 members of the 16-person crew are stationed in the control room for the duration of the game.<sup>9</sup> Timberwolves Basketball could readily station one of its officials in the control room, for example, to directly oversee the 10 crewmembers stationed there, and by viewing the monitors that display the camera feeds, that official could also indirect-

<sup>6</sup> Timberwolves Basketball generally sets the call times for each position, although Nelson testified that he had negotiated the call time with at least one crewmember, and Babiec testified that if she was late for a call time due to traffic, she would notify Timberwolves Basketball but her tardiness would not affect her pay. As discussed infra, the requirement that crewmembers be physically present at the time and place where a game is to be played would apply regardless of whether they are employees or independent contractors and thus does not indicate employee status in the circumstances presented here.

<sup>7</sup> *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1766 (2011), enfd. 822 F.3d 563 (D.C. Cir. 2016), cited by my colleagues for this point, provides no support for their position. There, the employer issued a written reprimand to a musician for unprofessional behavior and threatened further discipline, including a suspension, if the conduct was repeated. No conduct of this character is present in this case.

<sup>8</sup> As the majority notes, the significance of whether the principal (here, Timberwolves Basketball) is “in business” is unclear and has been questioned by some courts. See, e.g., *Martinez v. Miami-Dade County*, 32 F.Supp.3d 1232, 1239 (S.D.Fla. 2014) (“[T]he relevance of this factor is obscure. . . . Thus, little weight is afforded to this factor.”) (internal quotations omitted), affd. sub nom. *Blue Martini Kendall, LLC v. Miami Dade County Florida*, 816 F.3d 1343 (11th Cir. 2016); *In re Supplement Spot, LLC*, 2009 WL 2006834, at \*17 (Bankr. S.D. Tex. 2009) (using same analysis as would apply to determine whether or not the work is a part of the employer’s regular business). Insofar as the factor of whether the principal is “in business” merely duplicates other factors, I believe that it is not entitled to any additional weight.

<sup>9</sup> See Tr. 207.

ly oversee the camera operators. Timberwolves Basketball's choice not to do so and instead to rely on the crewmembers to direct themselves strongly supports a finding that the crewmembers are independent contractors.<sup>10</sup>

4. *Skill Required.* It is undisputed that most of the production positions filled by the crewmembers require a high degree of skill. These include the Director, Technical Director, Engineers, Camera Operators, Audio/Tape Operators, and Replay Operators. The Utility position requires less skill, although it still requires specialized knowledge of how to wrap cable.<sup>11</sup> It is also undisputed that the Employer generally does not train crewmembers but instead places on its call list only persons who already possess the required skills. In these circumstances, the Regional Director properly found that this factor weighs heavily in favor of independent contractor status.

My colleagues nevertheless find the factor inconclusive. First, they posit that this factor only works one way: a low degree of skill suggests employee status but a high degree of skill does not "always" indicate that an individual is an independent contractor.<sup>12</sup> This observa-

tion is misplaced because "the skill required in the particular occupation" remains a material factor in the common law test for employee status. I believe the Board is without authority to refuse to give weight to the *presence* of a skill requirement simply because doing so will lead to a finding that disputed individuals are independent contractors. See *Lancaster Symphony Orchestra*, supra, 822 F.3d at 568 (high degree of skill suggests independent contractor status); *FedEx Home Delivery v. NLRB*, supra, 849 F.3d at 1127–1128 (courts owe no deference to NLRB determinations that particular individuals are employees and not independent contractors).

The majority also faults Timberwolves Basketball for failing to present detailed evidence regarding the skill level of each crewmember at the time they began working for Timberwolves Basketball, despite the clear testimony by Nelson that Timberwolves Basketball required each crewmember to possess the relevant skill and experience at the time they were placed on the list and did not provide training with rare exceptions. As I have previously explained, the Board should not disregard unrebutted evidence "merely because it could have been stronger, more detailed, or supported by more specific examples." *Buchanan Marine*, 363 NLRB No. 58, slip op. at 9 (2015) (Member Miscimarra, dissenting) (citations omitted). Consistent with the preponderance of the evidence standard, the majority similarly errs insofar as they give the few instances of Timberwolves Basketball–provided training greater weight than the general practice, applicable in the overwhelming majority of cases, of not providing training.<sup>13</sup>

<sup>10</sup> The cases cited by the majority in this respect are all readily distinguishable, as each involves employees whose dispersed work locations made direct observation infeasible. *Sisters' Camelot*, 363 NLRB No. 13 (2015), involved door-to-door solicitors dispersed throughout a designated canvassing area. *Mitchell Bros. Truck Lines*, 249 NLRB 476, 481 (1980), involved truck drivers, and the Board found that the employer indirectly supervised the drivers by requiring periodic physical exams, regular inspection of their vehicles, and inspection of their trip reports and settlement statements. *AmeriHealth Inc./AmeriHealth HMO*, 329 NLRB 870, 870 fn. 1, 883 (1999), involved physicians, who provided medical treatment free of direct employer control consistent with their status as professional employees, and who were in any event monitored by paperwork requirements, telephone, and computer and received annual evaluations. *Michigan Eye Bank*, 265 NLRB 1377, 1379 (1982), involved technicians and research assistants who traveled to various hospital morgues to remove corneal tissue from cadavers for transplantation, work that the Board found to be routine such that it required little if any supervision. In addition, the employer required the disputed individuals to attend "weekly monitoring meetings." As noted above, the crewmembers at issue in this case work from a single location and thus are not dispersed in the way the individuals at issue in these cases were. My colleagues note that, during games, Folkestad watches the center court video display and sometimes calls the control room to request certain coverage. I do not believe that these facts demonstrate meaningful supervision, especially since all of the spectators at the game similarly watch the video display.

<sup>11</sup> Crewmember Jason Wiltse testified that "utility needs to be able to wrap cable, run cable, you know, from the wall out to the floor, assist in any other needs in setting up the cable and the camera and other semi-technical, but not always extremely technical, things that may come up." (Tr. 148.)

<sup>12</sup> It is not clear that possession of a high degree of skill would ever indicate independent contractor status in the majority's view. See, e.g., *Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107, slip op. at 6 (2017) (majority finds lacrosse referees are employees

despite position requiring a high degree of skill, finding factor favors employee status or is at least inconclusive). I relevantly dissented in that case.

<sup>13</sup> Citing *Sisters' Camelot*, supra, slip op. at 3, the majority contends that the crewmembers' undisputed possession of unique skills is undetermined by the fact that in a few cases they receive Timberwolves Basketball–provided training. In *Sisters' Camelot*, however, the putative independent contractors were canvassers who solicited donations door to door, no prior experience or specialized skill was required, and the training provided—to all canvassers—was "minimal." No facts of this character are present here. To the contrary, crewmember Wiltse testified to years of experience in the positions he worked for Timberwolves Basketball. (Tr. 148–149.) The other crewmember who testified, JoAnn Babiec, primarily worked as the technical director. While Babiec was not asked about her prior experience or skills, Nelson testified without contradiction that "the technical director position would need a fair amount of experience doing live programming on a board before working for the Timberwolves." Tr. 36. Further, it appears that at least some of the training that the majority relies upon was provided by other crewmembers, rather than by Timberwolves Basketball. Thus, Wiltse testified that "[t]he person that had done it before kind of showed me the in's and out's for what was needed there. And then at that utility position, I would be working with a camera operator that understood what he needed at that time from me running the cable, so something like that." Tr. 150.

5. *Who Supplies the Instrumentalities, Tools, and Place of Work.* The crewmembers operate audio and video equipment supplied by Timberwolves Basketball, working from Timberwolves Basketball's premises, and they do not provide their own tools or equipment with the sole exception of the Engineer in Charge. I agree with the Regional Director that this factor favors employee status.

6. *Length of Time.* Many of the crewmembers have worked for Timberwolves Basketball for years. Once a crewmember is added to the call list, he or she generally remains on it and is automatically offered work for ensuing years unless he or she takes some affirmative step to have his or her name removed. I agree with the Regional Director that this factor favors employee status.

7. *Method of Payment.* Most crewmembers are paid on a per-game basis, regardless of how long each game lasts, unless the game runs significantly longer than usual, in which case Timberwolves Basketball and the crewmembers will negotiate a higher rate. These facts tend to support independent contractor status.<sup>14</sup> See, e.g., *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (flat, per-assignment fee supports independent contractor status); *Young & Rubicam International*, 226 NLRB 1271, 1274 (1976) (fixed, per-assignment payment supports independent contractor status). The fact that Timberwolves Basketball does not make deductions from crewmembers' pay also supports independent contractor status. *Crew One Productions, Inc.*, 811 F.3d at 1312 (11th Cir. 2016); *Argix Direct, Inc.*, 343 NLRB 1017, 1021 (2006) (absence of any deductions for taxes or benefits and responsibility for expenses evidence independent contractor relationship); *American Guild of Musical Artists*, 157 NLRB 735, 736 fn. 1 (1966) (focusing on lack of tax withholding in finding musicians to be independent contractors); *NLRB v. Associated Diamond Cabs*, 702 F.2d 912, 924 fn. 3 (11th Cir. 1983) (absence of tax withholdings reflects independent contractor status). Finally, the fact that crewmembers are required to submit invoices for each game they work, are not paid until they submit the invoice, and must accept payment through direct deposit tends to support independent contractor status. *BKN, Inc.*, supra, 333 NLRB at 144 (fact that television script writers paid per episode pursuant to

invoices sent to employer supports finding them independent contractors).<sup>15</sup>

The Regional Director nevertheless found this factor inconclusive, and the majority agrees though for different reasons. My colleagues find, on the one hand, that the payment of an hourly rate to at most two crewmembers suggests employee status, and, on the other hand, that Timberwolves Basketball's "unilateral establishment of a per game rate weighs in favor of employee status." Later, they conclude that the per-game rate is not really unilateral after all, since the parties will negotiate a higher rate for games that last an unusually long time, and that these negotiations also favor a finding of employee status!<sup>16</sup> I believe that the Board cannot reasonably find that employee status is supported by *both* hourly and per-game rates, or that it is supported by *both* unilaterally-set and negotiated rates. In fact, the record shows that crewmember Jackie Gambaiani successfully negotiated a higher per-game rate,<sup>17</sup> other employees engaged in negotiations over their rates,<sup>18</sup> and Timberwolves Basketball would negotiate a rate with every crewmember for games that ran significantly longer than usual.<sup>19</sup> Taken as a whole, Timberwolves Basketball's general practice with regard to payment—as opposed to a few isolated exceptions to that practice—supports a finding that the crewmembers are independent contractors. See also *Argix Direct, Inc.*, supra, 343 NLRB at 1019, 1021 (payment of drivers on mileage basis supported independent

<sup>14</sup> The engineer in charge, who is almost always Sean Nottingham, is paid hourly. My colleagues find that the engineer 2 is also sometimes compensated on an hourly basis. However, Nelson testified that this position is paid a game rate, although crewmember Tessa Gauer sometimes submitted an invoice that billed the same amount as the game rate expressed on an hourly basis, and she also performed other duties in addition to her work as an Engineer 2 for which she was paid on an hourly basis.

<sup>15</sup> Indeed, the invoice and direct deposit requirements are inconsistent with employee status under Federal and Minnesota law. See *Brennan v. Quest Communications International, Inc.*, 727 F.Supp.2d 751, 762 (D.Minn. 2010) ("The burden to maintain accurate records falls on the employer regardless of whether the employee is responsible for recording his own hours on a time sheet.") (internal quotation omitted); Minn. Statutes § 181.101 (Employers "must pay all wages earned by an employee at least once every 31 days on a regular payday designated in advance by the employer regardless of whether the employee requests payment at longer intervals."); Minn. Statutes § 177.23 (employees entitled to be paid by cash or check unless they consent to payment by direct deposit or payroll card). Nothing in the text of Minn. Statutes § 181.101 suggests that it is inapplicable to employees who are paid on a per-event basis, as the majority suggests.

<sup>16</sup> Nelson testified that "if a game went to, you know, six overtimes, you know, we'd reasonably negotiate a higher rate for something that lasted a really long time. And that goes too, I think I mention—you know, there are certain circumstances, like home opener, where the call time is early. You know, we'll figure out, if there's extended time—most basketball games are actually pretty precise. They start at around 7 p.m. They end right around 9:30 p.m. So if there were extenuating circumstances where that was—that time was increased, we would just find a mutually agreeable rate for that given amount of time that was increased." (Tr. 54.)

<sup>17</sup> Tr. 56.

<sup>18</sup> When asked if Gambaiani was the only crewmember who "negotiated or attempted to negotiate over her rate," Nelson replied, "No." Tr. 96–97.

<sup>19</sup> Tr. 54, discussed supra.

contractor status, notwithstanding drivers also received fuel surcharge payment when fuel price surpassed stated level); *NLRB v. Associated Diamond Cabs*, supra, 702 F.2d at 921 (that taxi company “sets the standardized [taxi] lease terms and in some instances unilaterally changes them, even if true, is indicative only of relative bargaining power, not an employee-employer relationship”).

8. *Parties’ Mutual Understanding.* The crewmembers do not sign a contract with Timberwolves Basketball nor are they furnished with any other written form or agreement indicating that they are independent contractors. On the other hand, they are paid on the basis of invoices they submit and receive 1099 tax forms rather than the W-2 forms furnished to employees. I agree with the Regional Director that this factor is inconclusive.

9. *Independent Business.* Crewmembers both have a realistic opportunity to work for other employers and regularly do so. Thus, they choose which games they will work and suffer no adverse consequences if they decline a game. In addition, they have the ability to decline an assignment even after they have accepted it, and they can obtain a replacement from any qualified person on the call list. For example, Nelson testified that

the Vikings had a playoff game in December that conflicted with a Timberwolves game. You know, the Vikings game wasn’t on the schedule. So, all of a sudden, a number of people from the crew that I had scheduled for the Timberwolves game informed me that they would not be available to cover that game on that Sunday. And so then I would go to this roster to find, essentially, replacements. And they might also help me find replacements for themselves.

Tr. 49. I believe that these factors strongly support a finding that the crewmembers are independent contractors.

My colleagues find that this factor indicates that the crewmembers are employees, stressing that they lack any proprietary or ownership interest in their work or control over important business decisions, such as the scheduling of performance, hiring, selection or assignment of employees, or the commitment of capital. I agree with the majority that the crewmembers do not commit their own capital, but I disagree with the remaining aspects of the majority’s analysis. It is certainly true that, in order to produce audio and visual content for presentation to the audience at Timberwolves and Lynx games, the crewmembers must be physically present at the time and place where the game is played. In my view, however, it is unreasonable to *disregard* the nature of the work performed by the crew when minimizing their entrepreneur-

ial opportunity, and then to *invoke* the nature of the work to explain away the lack of supervision (which, as noted above, strongly undermines any finding of employee status here).<sup>20</sup> The requirement of physical presence at the same place and time as the game is played would apply to these individuals regardless of whether they were independent contractors or employees. There is, accordingly, no valid basis for finding that this requirement demonstrates employee status.<sup>21</sup>

#### Conclusion

The Board is charged with the responsibility to apply the National Labor Relations Act as devised by Congress, and the Act expressly excludes from the term “employee” anyone who has “the status of an independent contractor.”<sup>22</sup> Thus, the Board may not find that disputed individuals are employees when the record, viewed in light of common law agency principles, establishes that they are independent contractors. *FedEx I*, supra, 563 F.3d at 496 (the Board exceeds its jurisdiction and exercises power outside of “channels intended by Congress” when it disregards common-law principles in this area) (internal quotation omitted). As Judge Friendly aptly observed in *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 445 fn. 1 (2d Cir. 1975):

The legislative history of the Taft-Hartley Act reveals a clear desire on the part of Congress to restrain the tendency of courts, as evidenced in the *Hearst Publications* decision, to bow to the supposed expertness of the Board in its assessment whether a particular group should be considered employees for purposes of s 2(3) of the National Labor Relations Act. By its amendment

<sup>20</sup> As noted above, my colleagues (mistakenly) explain away the lack of Timberwolves Basketball’s supervision of the crewmembers as inherent in the nature of their work and thus not indicative of independent contractor status. Yet the majority cites the requirement that the crewmembers be present at the time and place where the game is played, which is also inherent in the nature of their work, to support employee status. There is no valid basis for deeming aspects of the crewmembers’ situation that are inherent in the nature of their work relevant only if they support employee status.

<sup>21</sup> In *Lancaster Symphony Orchestra*, supra, the Board majority found that orchestra musicians were not independent contractors in part because they could not perform a concert faster and thus increase their opportunity for additional work. 357 NLRB at 1765 fn. 8. Former Member Hayes relevantly dissented, observing in this respect that given the nature of symphony performances, the ability to accept or decline work with the symphony and to accept work elsewhere is the relevant consideration. *Id.* at 1768. I agree with the views stated in Member Hayes’ dissent, which are equally applicable to the crewmembers at issue in this case. See also *Lerohl v. Friends of Minnesota Sinfonia*, supra (same; notion that orchestra musicians are always employees when they perform in a conducted band or orchestra because the conductor controls rehearsal schedule, music choice and how music is played “flies in the face of [ ] common sense”).

<sup>22</sup> National Labor Relations Act Sec. 2(3).

to s 2(3) Congress indicated that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency.

(Internal quotations and citations omitted.)

For the reasons set forth above, I believe my colleagues incorrectly find that Timberwolves Basketball crewmembers are employees when the evidence overwhelmingly indicates that they are independent contractors based on the distinct skills they possess, the fact that they are paid on a per-game basis, their freedom to take other work, and the fact that Timberwolves Basketball does not control the details of their work or supervise them.

Accordingly, I respectfully dissent.

Dated, Washington, D.C., August 18, 2017

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Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD